Rosauers Supermarkets, Inc. *and* United Food and Commercial Workers Union Local 1439, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 19–CA–20184

November 16, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On July 25, 1990, Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel did not except to the judge's finding that the Respondent's further withholding of the wage program after the election did not violate the Act.

Daniel R. Sanders, Esq., for the General Counsel.
Howard Rubin, Esq. (Amburgey, Segel & Rubin, P.C.), of Portland, Oregon, for the Respondent.
Thomas W. McLane, Esq., of Spokane, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. Upon a charge filed by United Food and Commercial Workers Union Local 1439, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union) against Rosauers Supermarkets, Inc. (the Respondent), the Regional Director for Region 19 issued a complaint and notice of hearing on March 15, 1989. Basically the complaint alleged that on December 1, 1989, Respondent, prior to becoming aware of a representation petition filed by Union, notified its then nonunion restaurant employees at its Coeur d'Alene, Idaho facility that Respondent was going to implement a new ''Salary/Wage Administration Program'' effective January 1, 1989. Further, that on January 2, 1989, Respondent withdrew the program as it applied to the Coeur d'Alene employees because they engaged in protected concerted activity in joining and assisting the Union and thereby discriminated against the employees to discourage membership in the Union. This asserted conduct is alleged to be a violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), 29 U.S.C. §151 et seq.

Respondent filed an answer in which it admitted certain allegations of the complaint, denied others, and specifically denied engaging in any conduct which constituted an unfair labor practice.

A hearing was held in this matter in Spokane, Washington, on May 11, 1989. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues.

Upon the entire record in this matter, including my observation of the demeanor of the witnesses while testifying, and upon due consideration of the briefs and the arguments made by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings admit, and I find, Respondent is a State of Washington corporation engaged in the retail grocery business and related sales. Respondent maintains an office and a place of business in Spokane, Washington. During the 12 months preceding the issuance of the complaint herein, Respondent's gross sales from its business operations were in excess of $500,000. During the same time period, Respondent purchased goods and materials valued in excess of $50,000 directly from sources outside the State of Washington or from suppliers within the State, who in turn purchased the goods and materials directly from sources outside the State of Washington. Based on the above, I find Respondent is, and was at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Food and Commercial Workers Union Local 1439, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The issue presented by this case is whether Respondent refused to implement a previously announced wage adjustment proposal for the nonunion restaurant employees at its Coeur d'Alene facility[1] because the employees were seeking representation by the Union. With the exception of what was stated at a meeting between Respondent's management officials and the employees on December 1, 1988, there is little dispute concerning the operative facts in this matter.

A. *The Basis for the Change in the Wage Program for Respondent's Nonrepresented Employees*

The record shows Respondent operates a number of supermarkets in four different States. Some of the supermarkets contain delicatessens and restaurants, and the Coeur d'Alene, Idaho store is one such facility. The record further reveals that at some of the restaurant facilities, the employees are

[1] Respondent's Coeur d'Alene store is the only facility involved in this matter.

union-represented and at others, the employees are not represented. While the wages and other terms of conditions of employment of the union-represented employees are established by collective bargaining, the wage rates and other benefits of the nonrepresented employees are established by Respondent.

The record shows that prior to December 1988, Respondent followed a practice of setting a starting rate for the jobs performed by the nonrepresented employees with an automatic increase after 60 days if the employees were retained. There was no provision for wage adjustments thereafter. In addition, Respondent had a two-tier wage policy so that newer employees, performing the same work, earned approximately 50 cents an hour less than longer term employees.[2] Finally, the record establishes that prior to December 1988, the nonrepresented employees had not received any increase in wages for approximately 3 years.

Because of the perceived inequities in its wage system for the nonrepresented employees, Respondent developed a new wage program. Paul Van Gordon, Respondent's director of Human Resources and the architect of the new plan, testified it was a ''pay for performance program.'' Van Gordon described the plan as follows:

> The new plan was made up of a variety of factors. Primarily it was a pay for performance program, and that [sic] the employees would be evaluated by their manager once a year, and the results of that evaluation would be shared with the store manager who would add comments, and then it would be distributed to me for review and final approval as to the evaluation.
>
> The program itself consisted of identifying the value of the job in that market area. . . . And once the value of a particular job had been established, then a wage range would be attached to that value with a low point and a mid-point and a high point in that range, with the mid-point being the market value of that job.
>
> The third factor, of course, would be the corporation's financial picture at the time that wage considerations were being made, for both the corporation and the entity [the particular store] in question.
>
> And with those three factors, there was a formula that is produced which would dictate what, if any, amount of an increase employees would receive for their performance over the prior year, which was based a lot in part not only on the performance, but their placement in the range. Those at the higher range level are subject to get less to zero increase than those in the lower range, because the objective was to get all of our people in the mid-range, where the true value of the job was. Those folks that were outside of the range were to have no consideration for adjustments within that job classification, with their—obviously some exceptions, but generally speaking. And it was then our duty to try to get them into a different classification which would allow them to broaden their challenge and, of course, broaden their access to more income.

[2] The record is unclear as to when the two-tier system was instituted by Respondent.

B. *The Announcement of the Change in the Wage Program on December 1 and the Events Thereafter*

On December 1, 1988, Van Gordon and Respondent's district manager, along with the Coeur d'Alene store manager and restaurant manager, met with the restaurant employees at the store. The meeting was called because of low employee morale and problems in the store. Van Gordon spoke to the employees about changes that Respondent was considering to address these problems. These changes included the announcement of Respondent's new wage program.

According to Van Gordon, he told the employees that Respondent intended to introduce a new wage program beginning January 1, 1989. He testified he outlined the program as a ''pay for performance'' plan in which all employees would be evaluated once a year. According to Van Gordon he told the employees that any wage increase they received would depend on the market value of their jobs, their ''observable performance,'' and the financial condition of Respondent and the store. In response to a question about the two-tier wage system, he stated the new wage program would, over a period of time, eliminate these disparities caused by the two-tier practice. Van Gordon denied that he promised the employees they would automatically receive wage increases on January 1 but, rather, stated he informed the employees of the concept of the new wage program.

Van Gordon's testimony was corroborated by Nancy Strand, the restaurant and delicatessen manager at the store. Strand testified that Van Gordon told the employees the new wage program would eliminate the two-tier system ''somewhere down the road.'' Also, that the new wage plan would be based on performance and that the store needed to become profitable before wage increases could be granted. Strand stated that Van Gordon never informed the employees they would automatically receive wage increases beginning January 1.

Contrary to the testimony of Van Gordon and Strand, the employee witnesses attending this meeting gave a different version of Van Gordon's statements. Wendy Halfhide, a waitress, stated that Van Gordon spoke about the new management at the store and the cost of the employees' health benefits. When employees complained about a lack of wage increases over the past 3 years, Van Gordon, according to Halfhide, stated Respondent was discussing pay raises for the employees and there would be wage increases at the Coeur d'Alene, Missoula, and Spokane stores beginning January 1. Halfhide stated Van Gordon said the employees would be evaluated and the amount of wage increases they received would be based on that evaluation. Halfhide also recalled Van Gordon telling the employees that the two-tier wage structure would be abolished ''as soon as possible.''

Maureen Eddington, another waitress at the Coeur d'Alene store, testified that she was the employee to bring up the disparity caused by the two-tier wage system. Eddington stated that Van Gordon told the employees they would all receive wage increases beginning January 1. Eddington stated that Van Gordon did not mention any set amount of a wage increase but said the employees would be evaluated, and the amount of increase they received would depend on the evaluation.

Shortly after the meeting on December 1, Respondent received the Union's petition to represent the restaurant employees at the Coeur d'Alene facility. Ultimately, the parties

and the Regional Director arrived at an agreement to hold a Board-conducted election on January 11, 1989. In the interim, Respondent continued to work on and completed the details of the new wage program.

On December 30, Van Gordon contacted the union president, Sean Harrigan, and asked if the Union would file unfair labor practice charges against the Respondent should it implement the new wage program on January 1. Harrigan responded by saying, ''probably.'' Harrigan told Van Gordon that the Union would have no objections to Respondent implementing the new wage program—provided none of the Coeur d'Alene employees were adversely affected—after the election without regard to its outcome. When Van Gordon protested that he had informed the employees on December 1 that the new wage program was going to be instituted on January 1, Harrigan replied that Van Gordon should not have made that promise.

Following the conversation with Harrigan and after consultation with Respondent's attorney, Van Gordon decided not to implement the new wage program at the Coeur d'Alene facility. On January 2, 1989,[3] Respondent sent a letter over Van Gordon's signature to each of the Coeur d'Alene employees setting forth the basis of the decision not to implement the new wage program. In the letter, Van Gordon stated Respondent would not implement the new wage program until after the election. He recapped his conversation with Harrigan and accurately set forth the possible scenarios that could possibly occur if Respondent implemented the changes prior to the election and the Union filed unfair labor practice charges against it. Van Gordon concluded the letter with the following statements:

> [W]e cannot at this time follow through with our January 1, 1989 implementation of the new Salary/Wage program at Coeur d'Alene. Our apologies on this matter, but the risk of implementing at this time and the impact that Act may have on the Election process are too great.[4]

On January 10, Van Gordon received a letter from Jim Henson, the administrative assistant of the Union, protesting Respondent's decision to postpone the implementation of the new wage program. Henson insisted that Respondent ''immediately implement the scheduled wage increases retro-active [sic] to January 1, 1989.'' (G.C. Exh. 4.) The Union won the Board-conducted election on January 11 and Van Gordon responded to Henson's letter on January 17.

In his response, Van Gordon indicated that Respondent had sought permission from the Union to implement the new wage program at the Coeur d'Alene store. He stated the new plan would not have necessarily resulted in any wage increases for the employees, but since the Union denied permission, Respondent did not implement the change. Van Gordon stated that since the Union won the election, ''the whole matter of wage increases will be a vital part of our upcoming negotiations. Therefore, [Respondent] is going to include in its proposals for collective-bargaining agreement, the changes in procedure and wage ranges that would have been implemented in early January 1989.'' (G.C. Exh. 5.)

[3] All dates after refer to the year 1989.

[4] See G.C. Exh. 3.

It was on the basis of these events that the Union filed the charge resulting in the complaint in this matter.

Concluding Findings

The General Counsel takes the position this case presents a straightforward example of an employer unlawfully withholding a preplanned wage change from its employees in the face of a pending representation election and placing the onus on the Union for the failure to grant the wage benefit. As correctly noted by the General Counsel, it is a settled proposition that when confronted with an election petition, an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene. *Atlantic Forest Products*, 282 NLRB 855 (1987); *Centre Engineering*, 253 NLRB 419 (1980); *Dan Howard Mfg. Co*., 158 NLRB 805 (1966), enfd. in pertinent part 390 F.2d 304 (7th Cir. 1968). Further, that an exception to this general rule is permitted when an employer postpones or defers a wage or benefit adjustment and makes clear to the employees that it is doing so to avoid the appearance of influencing the outcome of the election and interfering with the employees' exercise of their Section 7 rights. See, e.g., *Village Thrift Store*, 272 NLRB 572 (1983); *Centre Engineering*, supra. In doing so, however, an employer cannot place the onus for the deferral or postponement of the wage or benefit adjustments on the union; thereby creating an impression that the union prevented the granting of the benefits. *Parma Industries*, 292 NLRB 90 (1988); *Atlantic Forest Products*, supra.

In applying these principles to the facts of the instant case, the General Counsel reasons the Respondent violated the Act by announcing the withholding of and the subsequent failure to implement the new wage program. I do not agree. In my judgment, the General Counsel's view of the facts is far too constricted and limited and does not take into account all of the factors which must be considered in analyzing cases of this nature. See *Nissan Motor Corp*., 263 NLRB 635 (1980).

The factors beyond those suggested by the General Counsel include: whether the Union involved has made any threats to protest the conferring of the benefits;[5] whether the Respondent made an effort to secure the Union's consent to the granting of the benefits;[6] whether in announcing the postponement or deferral of the benefits the Respondent made clear to the employees that the purpose of the deferral was to avoid the appearance of interfering with the election process;[7] whether the Respondent's comments regarding the deferral of the benefits were made in the context of an anti-union appeal; and whether the announcement of the deferral was made at a time that the Respondent was committing unfair labor practices.[8]

Consideration of the above factors, in the context of the instant case, causes me to conclude that the evidence does not preponderate in favor of the finding of a violation. First, it should be noted that the pleadings and the admission of Counsel make it clear that, other than the postponement of the wage program, Respondent has not engaged in any un-

[5] *Marathon Metallic Bldg. Co*., 224 NLRB 121, 123 (1976); *Marine World USA*, 236 NLRB 89, 90 (1978), enf. denied 211 F.2d 1274 (9th Cir. 1980).

[6] *McCormick Longmetal Stone Co*., 158 NLRB 1237 (1966).

[7] *Nissan Motor Corp*., supra; *Centre Engineering*, supra.

[8] *Chatfield-Anderson Co*., 236 NLRB 50 (1978), enfd. as modified on other grounds 606 F.2d 266 (9th Cir. 1979).

lawful conduct or interfered with the rights of the employees guaranteed by the Act.

Second, I do not view the testimony concerning the employees' expectation of a wage increase effective January 1 and Respondent's testimony that only the concept of the new wage program was announced at the December 1, 1988 meeting to be a serious conflict affecting the decision in this case. I find that both the employee and management witnesses were truthful and straightforward in their testimony. Thus, I find that Van Gordon outlined the proposed new wage program to the employees with Respondent's anticipation that it would be a more equitable wage program and the employees interpreted this to mean, mistakenly or not, that the program would result in wage increases. Whether the new program would have resulted in immediate wage increases cannot be determined on this record. It is clear from all of the testimony, however, that no specific amounts of increases were announced. Rather, only that the new wage program would be implemented on January 1.

Next, it is equally clear from the record that on December 30, 1988, Van Gordon advised the union president of Respondent's proposal to implement the new wage program on January 1 and was informed that the Union would probably file a charge against the employer for doing so while the election was pending. It was as a result of this conversation that Van Gordon announced to the employees that the wage program would be postponed. He carefully set forth in his letter to the employees the precise reason why it was postponed and the fact that Respondent was doing so to avoid all appearance of being charged with interfering with the election process.

Finally, the General Counsel contends that by continuing to withhold the implementation of the new wage program after the results of the election was established the Respondent further violated the Act. I do not agree. Respondent's letter to the Union on January 17 clearly indicates that Respondent proposed to put the new wage program on the table as part of its bargaining proposal to the Union. It is well apparent that the Union was at that point the representative of the employees. Had the Respondent then unilaterally implemented the new wage program, it would have been subjected to a subsequent refusal-to-bargain charge by the Union. In these circumstances, I find that Respondent's conduct was not a violation of the Act. Rather, Respondent's conduct here was in keeping with its responsibility to negotiate with the Union concerning changes in the wages, hours, and other conditions of employment of the now-represented employees.

CONCLUSIONS OF LAW

1. Rosauers Supermarkets, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union Local 1439, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By postponing the implementation of a new wage program on January 1 when confronted with a pending Board election for representation by the Union, the Respondent did not violate Section 8(a)(1) and (3) of the Act.

ORDER[9]

Having found that the Respondent, Rosauers Supermarkets, Inc., has not committed any violations of the National Labor Relations Act, it is ordered that the complaint in this matter be dismissed in its entirety.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.